No. 2514

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

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JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN, GEORGE STANLEY and SAM SALLO,

*Appellants,*

vs.

H. GREENBERG,

*Appellee.*

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# BRIEF FOR APPELLEE.

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*By.....Deputy Clerk.*

F. D. Monckton,
Clerk.

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*Appellee.*

## BRIEF FOR APPELLEE.

### Statement of the Case.

This is a suit for an accounting and a dissolution of a mining copartnership. The undisputed facts admitted in the pleadings or disclosed in the transcript show that on or about the 19th day of March, 1910, the plaintiff in the Court below, hereinafter referred to as the appellee, and the defendants, Jack Lesamis, John Tyapay, and Andy Garbin, in the Court below hereinafter referred to as the appellants, entered into a mining copartnership to own, mine, and operate as a mining copartnership certain mining claims then owned by the appellants in the

Noatak-Kobuk Mining District, Alaska, and thereupon, on said date evidenced their mining copartnership by executing and delivering two written instruments set out in full in plaintiff's complaint, and later in the evidence, wherein and whereby the appellee became an equal mining partner in the mining claims and mining operations with the appellants, upon terms and conditions set out in said instrument.

Thereafter the partnership was named the Klery Creek Mining Company, and mining operations were begun on some of said mining claims by said mining copartnership. It is admitted that the appellee furnished the groceries and provisions mentioned in the agreement approximately $2,000 worth at his own cost and expense, and that he paid the sum of $6,000 by checks to the said appellants. That during the spring and summer of 1910, the gold production of said mining company was approximately $16,251.42, and that the total expense during said time was approximately $8,959.75, leaving the net profit of a little over $7,000. It is admitted from the fall of 1910 to the suspension of mining work in the fall of 1911, the total gold production amounted to $9,786.88 which included $1158.58 received from Jack Lesamis and Garbin (Tr. 206), while the total expenses for that period was $26,271.70 or a loss of over $16,000.

It is admitted that in the fall of 1911, certain mining leases were executed on several of the mining claims. It is admitted that on or about

the 2nd day of September, 1911, the appellants, Garbin and Lesamis conveyed by deeds their interest in the mining claims in controversy to appellants George Stanley and Sam Sallo in trust, and without any valuable consideration, and in disregard of the indebtedness then outstanding. It is admitted that Robinson, Magids & Co., who had assigned their claim to one Philip Murphy, was the sole creditor. Said Robinson, Magids & Co., having acted as treasurer or disbursing agent for the Klery Creek Mining Company, and having paid all the labor bills, supplies and groceries, and advanced necessary money for other expenses to the amount of nearly $30,000, some of which had been paid by gold dust, leaving approximately at the time the suit was instituted, between $17,000 and $18,000.

It is admitted that on the 24th day of October, 1911, said Philip Murphy attached the mining claims to secure the payment of the said indebtedness.

The disputed questions raised by the pleadings and evidence in the transcript were as follows:

(1) The meaning and intention of the parties as to how the appellants were to be paid the contingent payment of $24,000 expressed in the written agreement of March 19, 1910, Greenberg contending that appellants were to receive the first $24,000 net profits over and above all working expenses, while the appellants contended that they were

to receive the $24,000 out of one-quarter of the gross output of the mining claims, and later in a supplementary answer, contending that the money was due because Greenberg did not mine it from the mining claims.

(2) The appellants contended that the mining copartnership was dissolved in September, 1910, while Greenberg contended that no dissolution of partnership ever occurred.

(3) Appellants Stanley and Sallo contend they were bona fide purchasers and owners of the interests conveyed, while Greenberg contends that they became trustees of Garbin and Lesamis and that their deeds were fraudulent and void as against him.

(4) Greenberg contends that the leases executed in the fall of 1911 were executed for the Klery Creek Mining Company, while the defendants contend that the leases were executed only as cotenants.

The case was tried before the Court in the fall of 1913, and on the 21st day of October, 1913, the Court filed its written opinion (Tr. p. 50). Thereafter on the 28th day of October, 1913, the Court made, entered and filed its findings in favor of appellee, and subsequently on the 28th day of October, 1913, entered its decree (Tr. p. 81) in favor of the appellee and against the appellants.

## Specifications of Errors.

The appellants, after assigning a large number of alleged errors committed by the trial Court, have abandoned most of the assignments, and confine most of their attack upon the decree entered by the Court. They contend:

(1) That the Court erred in finding from the evidence that the balance of $24,000 was to be paid out of the net proceeds of the mining operations.

(2) That the Court erred in finding that the mining claims were brought into the partnership.

(3) That the Court erred in finding that the claim of Robinson, Magids & Co., or their assignee, Philip Murphy, was a debt of the Klery Creek Mining Company.

(4) That the Court failed to credit the appellants with the item of assessment work done on the mining claims in the Court's accounting.

(5) That the decree was final in character, but entered before all partnership matters were disposed of; and,

(6) That the Court erred in refusing and denying appellant's various motions to quash the execution, adjourn the sale, etc.

Since the appellants have neglected to discuss any other alleged errors assigned, we will confine our discussion of the evidence and the law to the same assignments raised by appellants in their brief.

## Argument.

In order to fully understand the fallacy of the contentions of appellants in attacking the Court's decree, we deem it best to take up considerable time of the Court in reviewing the evidence disclosed in the transcript, so far as there is any conflict on the disputed points raised in the pleadings and at the trial, in order to show this Court that the trial Court made the proper findings and decree under the evidence, and that said findings are thoroughly borne out and supported by the weight of the evidence.

It is seldom that a case contested as hotly as this one has been, and involving so large a record, has so few disputed points.

This case was before the Circuit Court on a former appeal.

*Greenberg v. Lesamis et al.,* 203 Fed. 678.

The case came up to this Court upon the appellee herein appealing from the lower Court's order refusing him an injunction and a receiver. At that time, the transcript disclosed practically the same showing that is before the Court now. Exhaustive depositions were in the record, together with several affidavits on either side, raising practically the same questions in dispute that this record shows.

This Court, an page 680 of its opinion, says:

> "It appears prima facie that a copartnership was entered into as alleged by the plaintiff; that said copartnership was not dissolved

> September 9, 1910, as claimed by the defendants, but continued in force and effect at least until Garbin and Lesamis sold, conveyed and assigned to Stanley and Sallo their several interests in the mining claims, and in all rights and privileges in and concerning the mining and copartnership property, which took place September 2, 1911. The evidence would seem to indicate, further, prima facie, at least, that these deeds were not executed in entire good faith, as no consideration was paid by the grantees. It further appears that Greenberg has a good cause of suit for dissolution of the copartnership and for an accounting."

We submit that this is now the law of this case, and that the trial Court was obliged to take this opinion of the Court as the law governing the trial, and that the questions of whether or not the plaintiff's complaint stated a good cause of action, or whether or not there was or was not a dissolution in the fall of 1910, and whether or not the deeds to Stanley and Sallo were bona fide, and whether or not Greenberg was or was not entitled to an accounting, were all settled by this Court in its opinion on the former appeal.

We contend that there was but one issue to be determined at the trial on the merits in the Court below, and that was for the Court to make and render an accounting between the partners. Our contention is that under the opinion of this Court in the former appeal, there was but one question open for determination, and that was the accounting between the parties.

However, whether or not this Court now takes the view that the decision in the former appeal should govern as the law, and preclude the appellants from now raising on this appeal any of the points enumerated and discusses in the former appeal, we assert that the transcript discloses a much stronger case in favor of appellee on all of these questions than the transcript on the preliminary motions. In other words, the transcript abounds with testimony that shows (1) that there never was a dissolution of the mining copartnership; (2) that Stanley and Sallo obtained their deeds from the other appellants without any consideration whatever, and solely to harass and defraud the appellee, and at all times were the trustees of said appellants; (3) that appellee was entitled to an accounting and a sale of the assets of the partnership, and a distribution thereof as prayed for in his complaint.

We contend that the record in this case discloses that the Court took and heard the evidence of all accounts, claims and demands due or owing the said mining copartnership, and considered all accounts and claims between the various partners.

The assets of the partnership consisted of the mining claims mentioned in the complaint and the gold dust extracted from the mining claims during the two years of operations, together with some of the royalty subsequently received, while the only indebtedness of the Klery Creek Mining Company was

the Robinson, Magids Co. debt, which had been assigned to Philip Murphy.

That this is so, we cite the Court to paragraph XII of the answer of Jack Lesamis, John Tyapay and Andy Garbin, on page 29 of the transcript, which reads as follows:

> "These defendants further allege that the only indebtedness of the Klery Creek Mining Company is a small amount in favor of S. B. Marshall and Kayhill in the sum of $2.50, and that these defendants are abundantly able to pay the same."

The record shows that this item was not a partnership debt, so that the only creditor that the Klery Creek Mining Company had was the said Robinson, Magids Company.

The plaintiff offered several witnesses, who testified as to the accounting as well as itemized statements (see Tr. 183-186; also Tr. 200-206) showing the financial condition of the Klery Creek Mining Company as to debits and credits, while the defendants stood by at the trial without offering any proof whatever to aid the Court in rendering an accounting either as to the expense account or the amount of gold extracted, while now they are before this Court complaining that the accounting rendered by the Court in its opinion, findings and decree, is not correct.

We will next consider the assigned errors as presented by appellants in their brief. First, they contend that the Court erred in finding against them,

and in favor of Greenberg, that the $24,000 balance payment of the purchase price was to be paid out of the proceeds of the gross net profits of the mining operations. Let us consider whether or not the evidence adduced in the record on this point sustains the trial Court. The expression used in the agreement (Tr. p. 5), which was drawn by Sam Magids, a witness called at the trial, was as follows:

> "The balance of $24,000 to be paid of the first money taken out of the ground."

This, we concede, was rather ambiguous, and needed explaining, but explanation is found in the documents, letters, telegrams, acts and subsequent conduct of all the parties.

Greenberg testified (Tr. p. 125) as follows:

> "I told them that I have not got any money to buy property with, none at all, so they decided to take the money out of the ground, from the profits of the ground, if I will give them a start to go ahead and work the ground with, that they knew they could take it out of the profits of the ground in one year; that all they wanted was to get a chance to get it opened up; so I agreed to give them $2000 worth of supplies. They were perfectly willing to take the money out of the ground if they were able to get supplies to operate on, and then this balance to be taken from the profits of their mining. I accepted that offer, I furnished them with groceries and provisions, mining tools, etc. There was to be paid $6000 in all, and a balance of $24,000 in addition to furnishing $2000 worth of supplies. I paid the defendants, Lesamis,

> Tyapay, and Garbin $6000 by checks on the bank; they cashed these checks; the balance of $24,000 was to be paid when the money comes out of the profits—out of the ground from operating the mines; no time was stated at all, just when the money comes out."

Again Greenberg says (Tr. p. 131):

> "The profits for the year 1910 were seven thousand, three hundred ninety-one and fifty-two hundredths dollars; the profit was divided between the three partners, Garbin, Lesamis and Tyapay. I did not get a cent, because that was the agreement that we had at the time I made the deal with them. I was to give them the profits above expenses and to take up the $6000 and then the balance was to be taken from the profits to pay the $30,000, which I was to give them for the fourth interest. They made no demand or protest against this division of the profits; they were satisfied; neither of the defendants claimed or made any demand that he was entitled to one-third of the gross proceeds."

On page 141 of the transcript, the Court will find a deed executed by John Tyapay and Jack Lesamis, executed on the 17th of June, 1911, which Greenberg contends was executed for a double purpose; first, to more clearly define the manner or method of payment of the balance of the money, and, second, so that the deed could be acknowledged and recorded as required by the laws of Alaska. This deed was intended to be signed by Garbin also, but he subsequently refused after consulting George Stanley, one of the appellants, who was acting as his legal

adviser in the mining camp where they lived. This deed provides that:

> "ALL OF THE FIRST GROSS OUTPUT shall be applied to the payment of said $24,000 after necessary expenses of operating have been deducted."

The Court will notice this deed was executed and delivered long before any trouble arose between the partners. The appellants in their brief contend that this deed was coerced or forced by Greenberg from the appellants, but we ask the Court to consider the testimony of the witness Judge Hobbes, who testified that he read the deed and explained it to both of them before they signed it (Tr. pp. 237, 238).

See also Greenberg's testimony (Tr. pp. 159-163).

The witness Sam Magids, who was present when the agreement was made between the partners, and who wrote the memorandum of agreement and deed of March 19, 1910, at Klery Creek, testified as follows with reference to the meaning of the agreement (Tr. p. 178).

> "They offered Greenberg a quarter interest in the ground; he pays them $2000 in supplies up to July 10, then $6000 and $24,000 out of the profits of the ground. Garbin and Lesamis and Tyapay were to have charge of the work and handle it to suit themselves; writings were made out and signed; I wrote the instruments offered in evidence, a memorandum and deed; I wrote them; there was no lawyer in the vicinity, etc."

Sam Magids testified as follows (Tr. p. 179):

> "I was present some time in December, when one settlement was had between Garbin and Mr. Greenberg; that was after Mr. Greenberg had got back from Nome; I participated in the adjustment or settlement of their mining operations; I made a statement for them showing the total gross amount of gold taken out and the total expenses of their mining operations; this statement I figured out for Mr. Garbin and Mr. Greenberg to show how much money Mr. Garbin had coming to him on his third profit of the mining from the Klery Creek Mining Company; Mr. Fox was also present; Mr. Garbin was satisfied with this adjustment; he accepted it as correct; we settled with him right there on that basis; Greenberg was satisfied with it; I got my figures from the Klery Creek Mining Company's books; I got the figures off the books; Mr. Fox kept the books."

Again Magids testified (Tr. p. 180):

> "Garbin said it was to be divided between the three; he claimed one-third of the profit, Tyapay and Lesamis were to have their two-thirds; they did not claim one-third of the gross."

Again Magids testified (Tr. 189) as follows:

> "Q. Why didn't you embody in the partnership agreement the terms of the partnership?
>
> A. I asked a good many times if that was the agreement before, before to make it more plain, and Mr. Garbin and Mr. Lesamis spoke up and said, 'We understand that we are to get $24,000 after the expenses are deducted'. Those are just the words they were used."

There is not a single statement or shred of evidence offered in the transcript that shows that the

appellants ever contended or claimed that they were entitled to the gross amount of gold extracted under their partnership agreement until after the partnership dispute arose in the fall of 1911, or about the time this suit was instituted. Andy Garbin, one of the appellants, in testifying, quite frankly admitted as follows (Tr. p. 214):

> "Bob Fox had charge of the work during the summer of 1910; Lesamis, Tyapay and I were there also; Greenberg got interest in all while we was a partnership; in all we had before—we were all to put up expenses for that year; we sent orders to the store in Kiana for what we wanted; Greenberg was there; we did not know anything about that Magids Company; we got $3000 or $4000 worth; the rest of the expenses went for labor; we were all to pay for it; we were to take it from the gold dust. The rest was profit; the three of us got that; we three—Greenberg was to get nothing."

In view of these facts in the record, how can this Court come to any other conclusion on the facts than that the trial Court, in finding that the balance of the purchase money of $24,000 was to be paid out of the net profits of the mining operations of the partnership, did not commit any error in so finding.

We next consider the questions raised by appellants as to whether or not the mining claims involved in the controversy were or were not partnership property.

The trial Court found that the placer mining claims mentioned in the complaint and subsequently

sold on execution were the partnership assets brought into the partnership under the scope and meaning of the partnership agreement.

If there was any real dispute in the record on these questions, we would feel inclined to discuss it at length, but we deem it enough to call the Court's attention to the testimony of Jack Lesamis, one of the appellants, on this question, which evidence alone, aside from the general language, meaning and intent of the partnership agreement, would be sufficient to sustain the finding of the lower Court against the appellants. Jack Lesamis (Tr. p. 226) testified as follows:

> "We had a partnership agreement at the time we made the deal with Greenberg. In that partnership we put the claims in jointly and worked as a partnership. We then took Greenberg as a one-quarter partner. He was to put up all the groceries until July; give us $6000 and the balance out of his share in the ground. At that time the claims were all in the partnership."

The agreement (Tr. p. 5) recites as follows:

> "H. Greenberg is, and shall be a full-fledged partner with the above mentioned parties & have one-quarter undivided interest in all claims, lodes, water rights, acquired or to be acquired and owned by the above mentioned parties."

Our contention is that all of the mining property described was brought into the partnership to hold in trust in the names of the partners for the uses and purposes of the partnership. This being so, the

law cited by appellants in their brief on pages 17, 18, and 19 has no application whatever, and the authorities are not in point. The leases were signed by the individual members of the partnership because the legal title stood in their names for the Klery Creek Mining Company. But the record clearly discloses that it was the Klery Creek Mining Company that gave the leases.

> "The mining ground belonging to and worked by a mining partnership, and acquired for mining purposes, whether purchased with partnership funds or brought into the concern by individual members as a porton of the capital stock, is, in equity, for the purpose of a settlement of the partnership affairs, to be treated as partnership property."
>
> *Lindley on Mines,* Vol. 3, Sec. 802;
>
> *Duryea v. Burt,* 28 Cal. 569.

> "Where land is brought into a partnership as stock, it is, as between the partners, their creditors, and one who has knowingly dealt with them for it, personalty belonging to the firm."
>
> *Lindley on Mines,* ibid., Sec. 802;
>
> *West Hickory M. Ass'n v. Reed,* 80 Pac. 38.

All of the mining property mentioned in the complaint was by the partnership agreement impressed with the character of partnership property, and could only be divested of that character by a dissolution of the same.

The case of *Holton v. Guinn,* 76 Fed. 96, cited by appellant is not authority in this case. There the Court found as a matter of fact that it was the

plainly stated intent of the parties that there was no partnership in the land, but that they were tenants in common. Of course, we are not confronted here with any such finding.

We have no quarrel with counsel on the proposition of law that realty may be used for partnership purposes and not belong to the partnership, but that principle of law is not involved here. We contend that the intention to transform these mining claims into the character of partnership property was not only clearly expressed in the contract, but was actually done at the time by the appellants.

This Court on the former appeal, *Greenberg v. Lesamis,* 203 Fed. at page 680, says:

> "The mining claims are made a subject of litigation, being specifically described in the complaint. Whoever deals with such claims must deal with them with notice and knowledge of the suit pending concerning them."

This Court considered the mining claims just as the Court below did, as having been brought into the partnership by the partnership agreement which was of record, and notice to any one when dealing with the mining claims described in the complaint in this suit. We submit there is ample proof in the record to sustain the finding of the lower Court in this regard.

We next consider the assignment of appellants that the Court erred in finding that the claim of Robinson, Magids & Co. or their assignee, Philip

Murphy, was a debt of the Klery Creek Mining Company.

This Court, as observed before, has already, on the former appeal, held that there was ample evidence to show that there was no dissolution of the partnership in 1910. Consequently, the mining operations conducted that winter and the following summer were the mining operations of the Klery Creek Mining Company, and the record abounds in testimony to support this contention.

Greenberg testified (Tr. p. 132) as follows:

> "During the winter and spring of 1910-1911, they worked, prospecting, and doing assessment work for the Klery Creek Mining Company on the claims mentioned in the agreement. Mr. Garbin was there; he was there for himself and also was there for the other partners. I was not there myself. Garbin hired the men, Robinson, Magids & Co. paid the bills, acting as treasurer employed by the Klery Creek Mining Company as a sort of clearing house."

We direct the Court's attention to plaintiff's exhibit "I" (Tr. p. 174), being a letter dated June 14, 1911, from Andy Garbin to Mr. John Lichtenberg, Keewalik, Alaska, reading as follows:

> "Dear Sir: Send the following telegram at your earliest chance: 'Greenberg, Lesamis, Tyapay, care Bessie Store, Nome. Send forty men to our camp at Klery. No men to be had here. Andy Garbin.'"

And again, see plaintiff's exhibit "F" (Tr. p. 149), being a telegram dated July 7, 1911, reading as follows:

> "Candle, Alaska, July 7, 1911. Greenberg, Lesamis & Tyapay, Nome. Send forty men to our camp at Klery. No men to be had here. A. Garbin, by H. Robinson."

Is not this almost conclusive proof alone that the partnership was not dissolved, but that the partners through Andy Garbin were then mining and operating in the summer of 1911 at Klery Creek? But we again direct the Court's attention to plaintiff's exhibit "G" (Tr. p. 150), being a letter from John Tyapay and Jack Lesamis, dated October 20, 1910, to Mr. Greenberg, wherein it is specifically stated as follows:

> "You tell to Mr. R. H. Fox that, let 'im stard early in neckst spring that would lose no time as this we dit this last spring."

This letter shows clearly on the face of it, that the partnership was not dissolved, but was to be continued to next spring under Mr. Fox as foreman, or some other good man, as they suggested in the letter. See also plaintiff's exhibit "H" (Tr. p. 152), which was a letter bearing date February 20, 1912, and after this suit was instituted being a letter from John Tyapay to Mr. Greenberg, wherein he states as follows:

> "I gade (got) telegraph from lawyers from Mr. Cohran and Mr. Lowmen that has suit entred to dissolve (brek) partnership. That a bad news, when you people cannot to gade long. Who is that fellow who stard the trouble?"

Now this letter, bear in mind, was written in 1912 and long after the Robinson, Magids & Co. indebt-

edness had been incurred, showing how ridiculous it is to contend that the partnership was dissolved and that the Robinson, Magids & Co. indebtedness was the personal indebtedness of Greenberg.

We also direct the Court's attention to the testimony of Greenberg (Tr. p. 175), where he says that upon receipt of the telegram from Candle, he and Murphy discussed the matter of hiring the men with Jack Lesamis, and then employed the men and sent them up to the mines.

See, also, the testimony of Philip Murphy (Tr. p. 234); also Tr. p. 176, where Andy Garbin admits that he had the custody of the gold and kept the key to the strong box.

Greenberg, testifying (Tr. p. 157), says:

> "Robinson, Magids & Co. are interested with me—in business with me; they are not interested with me in these mining claims."

See also transcript, page 196, where Greenberg testified:

> "Robinson, Magids & Co. have no interest in the Klery Creek Mining Company, and never had. I am liable to my partners personally for the indebtedness to the Klery Creek Mining Company. It was all charged up to me personally."

See also the testimony of W. L. Levy (Tr. p. 198):

> "I kept the books for Robinson, Magids & Co. Stuart Fleming kept the books for Klery Creek Mining Company. The Klery Creek Mining Company purchased their provisions

> and supplies at our store. The time checks were paid at our store."

The record abounds in testimony that is undisputed, and uncontrovertible that all the mining operations were conducted by the Klery Creek Mining Company, and that the Robinson, Magids Company paid the bills for labor, supplies, etc., and was the only creditor that the Klery Creek Mining Company had.

Plaintiff's exhibit "M" (Tr. p. 200), prepared by Levy, the bookkeeper, shows that Robinson, Magids & Co., during the second year of the partnership was a creditor to the total amount of $29,898.91, which indebtedness was reduced by certain credits to an amount claimed by the Robinson, Magids Co., or Philip Murphy, assignee, in the fall of 1911, of $17,124. The Court found in the accounting between the partners and the admissions of Levy and others that this indebtedness was further reduced to the sum of $16,484.82, said reduction occurring on account of certain royalties that had been received by Levy for the Klery Creek Mining Company and paid over to the Robinson, Magids Company on its indebtedness.

In order to find that the Court erred in finding that this debt was not the debt of the Klery Creek Mining Company, this Court would have to find from the record that a dissolution of partnership had occurred in 1910, and that the debt was Greenberg's personal debt.

> "Necessarily the dissatisfied partner must give to his associates fair and unequivocal notice of his withdrawal, and to protect himself from future liability as to creditors with whom the partnership had been theretofore accustomed to deal, a like notice to such creditors must be given."
>
> *Lindley on Mines,* Vol. 3, Sec. 803;
>
> *Slater v. Haas,* 25 Pac. 1089;
>
> *Madar v. Norman,* 92 Pac. 572.

The fraudulent sale to Sallo and Stanley did not dissolve the partnership.

> *Kahn v. Central Smelting Co.,* 102 U. S. 641.

See, also, *Lindley on Mines*, Vol. 3, Sec. 803, and cases therein cited.

Appellants in their brief complain that the Court did not allow for the assessment work done by Stanley and Sallo. Appellants are in error on this point, because while it is not specifically stated in the decree, yet it was considered and allowed by the Court. The Court found that Stanley and Sallo were trustees acting for Garbin and Lesamis, and found that the $2400 worth of work done by them was done for the four partners, $600 of which Greenberg would have to make good. The Court, instead of directing Greenberg to pay this $600 over to the appellants, charged it against Greenberg, thereby increasing his proportion of the remaining indebtedness far in excess of the individual indebtedness of appellants.

It is further contended by appellants that the decree was entered prematurely or before all partnership matters were disposed of.

The appellee submitted all the evidence within his reach to show and inform the Court of the exact amount of the gold production and the exact amount of expenses and aided and assisted the Court in every way within his power to arrive at a correct accounting. On the other hand, the appellants did everything within their power to prevent an accounting, resisting appellee's efforts to reach a correct accounting, and resisting appellee's efforts to have a receiver appointed to collect the royalty and any other assets.

The appellants are not in a very good position before this Court to complain of error on the part of the trial Court, so far as its findings on the accounting are concerned. The Court, in its opinion (Tr. pp. 53, 54), and again in its findings of fact (Tr. pp. 63, 64, 65) rendered a very clear and explicit account of all of the amounts due by each partner. In doing so, the Court considered all of the evidence that was submitted. The Court found that Lesamis had received $1000, and was indebted to the partnership for $726, for gold dust appropriated and loaned to one Moran, and found that Tyapay had received $2000, and Andy Garbin, including nuggets, the sum of $1512.12. The Court further considered and allowed the item of $2001 advanced toward the 1911 expenses, because in the findings of fact (Tr. p. 64) the Court specifically names the credits that each of the parties had at the beginning of 1911, Lesamis having $737.89, Tyapay $463.89, and Garbin $951.70.

The Court, in reaching its final conclusion on the accounting, found that the gold dust for 1911 amounted to $9786.88. In doing this, the Court took the amount of gold dust extracted by the partnership (Tr. 206), which amounted to $8628.30, and added to it the $1158.58 borrowed by Jack Lesamis from his brother, Frank Lesamis. By this method, the Court charged the $1158.58 against Lesamis and Garbin, who borrowed it from Frank Lesamis, but gave Robinson, Magids & Co. credit, thereby reducing the Klery Creek Mining Company indebtedness to Robinson, Magids & Co. in the sum of $1158.58 (Tr. 206). It is in evidence that Andy Garbin received 50 ounces of gold dust, which he did not return or account to the partnership for. In addition to this, it is in evidence (Tr. pp. 168, 195) that there was $2000 worth of provisions and supplies left on the premises at the close of mining in 1911 at the time this suit was instituted.

These provisions and supplies were left with Garbin and Lesamis to sell and apply the proceeds to the reduction of the indebtedness of the Klery Creek Mining Company. The evidence shows that Lesamis and Garbin converted this property to their own use and never accounted for it to the Klery Creek Mining Company in any manner.

The appellant Stanley (Tr. p. 232) testified as follows:

> "The royalties collected by Mr. Sallo were not paid to Robinson, Magids & Co.; they were for his interest in the leases. I paid Garbin

his share of the royalties collected under the leases."

The Court, in arriving at the accounting between the partners, charged the gold dust loan to one Moran against Jack Lesamis; the nuggets and 50 ounces of gold obtained by Garbin against him; the $2000 worth of provisions and supplies converted by Lesamis and Garbin against them. The Court allowed Lesamis and Garbin a credit for the money they had coming at the beginning of operations in 1911 and allowed them a credit for the gold dust that the record shows (Tr. p. 206) that they got from Frank Lesamis. From all of these various items the Court in its findings (Tr. pp. 64, 65) found that instead of each of the partners owing the sum of $4828.73, that Jack Lesamis owed the sum of $4429.21, Tyapay $4703.21, Garbin $4215.40, and Greenberg the sum of $5967.10. The reason Greenberg was indebted in such a large sum was that the Court charged against him in favor of his partners $600 for his share of the $2400 assessment work done by Stanley and Sallo, and found that Greenberg was entitled to bear his proportionate share of the amount credited at the beginning of operations in 1911, which Greenberg had not advanced. So far as the royalty is concerned, it is in evidence that the appellants collected and kept one-half of the royalty and never accounted for the same to the Klery Creek Mining Company in any manner whatever. On the other hand, it is in evidence that the royalty collected by Greenberg's rep-

resentatives was applied on the reduction of the Robinson, Magids Co. indebtedness, so that Greenberg is really the one that should be complaining of the unfairness of this portion of the accounting instead of appellants. If the Court made any error whatever, in reaching the final amounts that each partner owed on the outstanding indebtedness, it could not amount to very much one way or the other, and certainly the royalty collected by the appellants and kept by them, amounting to some $1300, would offset and overcome any error that the Court might have made against them.

The Court, in reaching this accounting, certainly believed the position of the appellants taken in their answer where they denied that there was any partnership indebtedness at all and the Court, from all the evidence offered, could come to no other conclusion that the only creditor that the Klery Creek Mining Company had was Robinson, Magids & Co., or their assignee, Philip Murphy, in the total sum of $19,314.94, being principal and interest up to the time of the accounting.

The mortgage deal between Tyapay and Greenberg was a personal transaction, and had nothing to do with the partnership affairs. It is only emphasized now by appellants, as in the lower Court, to attempt to prejudice the Court against appellee. The record shows Tyapay can get his interest any time, by refunding or repaying Greenberg the money loaned or for a good deal less.

The appellants, in their brief, contend that there should have been an interlocutory decree entered in this case. We submit that the findings of the Court, together with its conclusions of law, this being an equity case, was ample so far as the accounting was concerned, and as the accounts were not complicated, a reference of the matter to a referee was unnecessary, and therefore a report of a referee unnecessary.

Appellants rely upon the case of *Albery v. Geis,* 82 Pac. 262, as an authority that the decree was erroneous for the reason that it does not adjudicate the rights of the parties among themselves. The case of *Albery v. Geis* was reversed because the findings were inadequate and did not show that any accounting had been taken and a personal judgment was entered. Surely this case would not be good law where the findings are adequate and exhaustive and the record shows that the Court had gone into all of the details of the partnership and had taken the evidence on every phase of the case as to all of the output or assets and of all the debts of the concern.

In the *Albery v. Geis* case, the findings were very meager and wholly inadequate. In this suit, we did not ask for a personal judgment against the appellants, but we did ask the Court to sell the assets and distribute the same, which the Court has done. The rule is correctly stated in Section 971 of *Vol. 2 of Bates on Partnership:*

> "No personal decree is to be rendered against individual partners until the assets have been

> converted into money; that is to say, the excess of receipts by a partner over his disbursements is not to be ordered paid in by him to the receiver before the assets have been exhausted, but is a mere item to be debited to him on the final balance."

Appellants contend that Greenberg should be compelled to pay the balance of $24,000 because he has not taken it out of the ground within a reasonable time, citing to the Court the case of *Pritchard v. McLeod,* 205 Fed. 24; and *Harrison v. Clarke,* 164 Fed. 539.

These cases are not in point, and certainly do not sustain the contention of appellants. In the *Pritchard* case, McLeod agreed to operate the mines and pay Pritchard 25% of the gross to the total of $25,000. Four years elapsed, and McLeod did not operate or pay. The Court held an implied obligation to work the mines or pay Pritchard within a reasonable time.

In the case at bar, a partnership was formed, and a duty devolved upon the appellants as well as the appellee to mine and operate the ground. The deferred payment was to come out of the net profit from the mining operations. Not only did the appellants refuse to aid the appellee to take the money from the mining claims, but they resisted his efforts and claimed the partnership was dissolved and refused to join him in operating. Besides, it is in evidence that numerous leases were let on the claims and were in full force at the time this suit was tried, and that the appellants were collecting

the royalty and appropriating it to their own use, notwithstanding the fact that appellee had applied to the Court for a receiver, which had been denied him in the lower Court and the ruling affirmed in this Court on the former appeal.

The case of *Harrison v. Clarke,* supra, was a case where the defendant, without justification or excuse, repudiated the contract entered into and refused to make the advances required, thereby terminating the enterprise. In its facts, this case was entirely dissimilar from the case at bar, and cannot be considered as authority.

The appellants contend that the trial Court erred in denying their various motions, to quash the execution; to adjourn the sale; and against the confirmation of the sale.

On this assignment, we cite the Court to the opinions of the trial Court found in the transcript, pages 105 and 113, and the cases therein cited.

The appellants contend that the Court should have entered some preliminary order between the entering of the decree and the granting of the writ of execution or that the United States Marshal should have made a levy on the mining property sold. This position is certainly untenable.

See *Vol. 2, Freeman on Executions,* Sec. 280, page 1587, where the rule is stated as follows:

> "If the sale has been ordered by a Court of Chancery under a suit in which all the parties in interest were before the Court, there is no need of any levy, for the right to sell the land

has attached as a consequence of the proceedings in the suit."

In the case at bar, the mining claims were set forth and described in the complaint, and were embraced within the partnership contract. All the interested parties were before the Court. The Court, in its decree (Tr. p. 84), specifically orders, adjudges and decrees that the United States Marshal for the District of Alaska, Second Division, sell the whole of said assets, both personal and real, in the said decree as described under order and execution of the Court in this action in the manner provided by law, and to pay the proceeds into Court for distribution. Certainly, this being an equitable case, the Court had jurisdiction of the property of the parties and had the right to direct the marshal to sell the property in the manner provided in the decree.

There was nothing left to be done but the ministerial act by the clerk of issuing the writ of execution to the marshal, who proceeded and sold the property in the manner provided for the public sale of property in Alaska, as the transcript shows.

The only object that the appellants could have in having a levy made by the marshal would be to have Stanley and Sallo come into Court and contend that their rights preceded the levy. That is probably why they are complaining because no levy was made.

As the lower Court well said:

> "Counsel for defendants failed to distinguish between a proceeding at law and a proceeding in equity" (Tr. p. 113).

There is nothing in the Compiled Statutes of Alaska that interferes with an equity Court selling the assets, real and personal, of a partnership as was done in this case.

The case of *Gray v. Brignardello,* 68 U. S. 627, relied upon by appellants, was a case where the decree was interlocutory and provided that the Commissioner appointed by the Court should make certain reports, and after these reports were approved by the Court, and after the further order of the Court, the Commissioner was to sell the property. In disregard of all this, the Commissioner proceeded and made a sale. The sale was held to be contrary to law, and set aside.

In the case at bar, there were no reports to be made, no Commissioner has been appointed, the Court had made its own findings instead of appointing a Commissioner, and had entered its final decree directing the marshal to sell the property according to law, the same as is done in all executions.

The practice is well defined in the Courts of Alaska under the Compiled Laws of Alaska, and when the marshal makes a sale under an execution, the marshal or the clerk distributes the proceeds of the sale as provided in the decree, purely as ministerial acts. The Court does not lose jurisdiction of

the case, but at all times can see that its judgment or decree is carried out.

> "Unlike a judgment at law on which execution issues, the decree of a Court of Chancery is itself the authority of the officer to sell."
>
> *24 Cyc.,* page 10.

See, also,

> *Karnes v. Harper,* 48 Ill. 527.
>
> "The order or decree must conform to the general requirements of law respecting the form of orders, decrees, and judgments, of Courts. It must describe the property to be sold, and specify in certain and precise language the duties to be performed by the Court's officer."
>
> *24 Cyc.,* page 10, and note with cases cited.

Appellants rely upon the case of *Bound v. Railway Co.,* 55 Fed. 186, as authority that the Court should have postponed the sale pending this appeal. This case is ably discussed and distinguished by the lower Court in its opinion denying the appellants' motion to postpone the sale (Tr. p. 114). The trial Court denied the motion to postpone the sale because no appeal was pending at that time. The appellants were threatening to appeal and wanted a postponement contingent upon taking an appeal for a period of twelve months. The lower Court held that to grant the motion of appellants would be to nullify Section 1007, R. S. U. S., or tantamount to making a *nunc pro tunc* order effectual for the purpose of a supersedeas. If such a motion should be granted it would be establishing a prac-

tice that every time a litigant was defeated he could threaten to appeal and apply to the Court for a stay of proceedings for one year, nullifying the law applicable to supersedeas. It certainly should not take a great deal of argument to expose the lack of logic and reason in appellant's contention.

The transcript shows that the sale was a public sale and the appellants had the same right to bid for the property that appellee had. The record also disclosed from the amount of assessment work done that a large proportion of the claims have been allowed to lapse and forfeit to the Government, and with the exception of a few of the claims a great portion of the acreage is now public domain open for the appellants or any one else to locate under the laws pertaining to mining claims.

The transcript shows that but very few of all of the placer claims enumerated in the complaint have been kept alive by annual representation or assessment work, and the few claims that remain are not considered of any great value.

This is certainly shown by the fact that the operations for 1911 resulted so disastrously to the Klery Creek Mining Company, while the royalty collected since the suit was instituted all told amounted to about $2500, being 25% of the gross output for two years. The record shows that all of the appellants are insolvent and unable to pay their proportion of the indebtedness. On the other hand, the record shows that Greenberg is solvent; the record further shows that the Klery Creek Mining Company is

indebted to Robinson, Magids & Co., of which Greenberg is the third owner, in the sum of $19,-314.94 for money, groceries and supplies advanced and paid for said mining company. Greenberg is responsible for this amount in an accounting with his partners in the mercantile firm of Robinson, Magids & Co., as the transcript shows they have no interest whatever in his mining ventures.

The appellants, in closing their brief, complain very bitterly of the fact that they have lost their interest in the mining claims, and see nothing but poverty and ruin staring them in the face. They fail to remember and recall that when they met Mr. Greenberg on the 19th of March, 1910, they were living on fish, with nothing in their supplies but flour and fish (Tr. pp. 125, 189).

The meeting of these men by Mr. Greenberg meant certainly a great financial loss to him. According to the undisputed testimony in the record, he advanced to them the sum of $2000 for the groceries and supplies, upon which they lived in luxury from March until July. He paid them the sum of $6000; he furnished them a line of credit at the mercantile store of Robinson, Magids & Co., in 1910, and stood by and saw the appellants draw down the sum of over $5000 from the profits of the partnership venture. He furnished a line of credit again in 1911 to the Klery Creek Mining Company with the firm of Robinson, Magids & Co., and, after paying $8000 out of his pocket and witnessing his partners draw down the sum of over $5000, he is left in the lurch by the appellants to settle with his

mercantile company for over $20,000 while they stand by and complain that Greenberg has beaten them out of a lot of worthless mining claims, so worthless that the Robinson, Magids Co., or its assignee, Philip Murphy, has not yet even sought to enforce their attachment lien.

Even if this Court should affirm the decree of the lower Court, it is very doubtful whether or not Greenberg will ever secure anything out of the mining property to aid him financially in settling his accounting with his mercantile partners. So far as the mining claims are concerned, the appellants seem to have abandoned them as being of no particular value long, long ago, and are pursuing this appeal in the weird hope that this Court will reverse this case and direct the lower Court to compel Greenberg to pay $24,000 contrary to all law and every fact in the record. Appellants are not satisfied with taking $8000 from Greenberg for a lot of worthless mining claims, and involving him in the payment of the whole of the Klery Creek Mining Company's indebtedness, but they are here in an equity Court claiming that they wish to do equity by asking this Court to further order Greenberg to pay into Court the sum of $24,000, or to permit them to have the first $24,000 of the gross, which is nearly the same thing in effect.

We have too much confidence in the ultimate justice of cases like the one at bar to believe that this Court could ever be persuaded that there is any equity in the contentions of the appellants on this

appeal. If the trial Court made any errors in the accounting betwen the partners, they are so slight that we do not believe this Court would be justified in reversing the case for a new accounting, especially in view of the fact that the appellants refused to assist the Court in arriving at these conclusions, but at all times resisted the accounting.

Should, however, this Court take the view that any substantial injustice has been done the appellants in the accounting, and a reversal is necessary, we submit the appellants, being in the wrong, and wholly responsible for the necessity of resort to litigation, should be compelled by order of this Court to pay the costs of suit. This is universally the rule in our Courts.

*Harrison v. Clarke*, supra.

This Court, on the former appeal in this case, held that it appeared from the record in the case that Greenberg had a good cause of suit for a dissolution of the copartnership and for an accounting, and, as we stated in the beginning of our argument, we believe that the only real question before the trial Court was the accounting between the partners, so we repeat, if any error was committed by the trial Court in making the accounting, the appellants, being in the wrong, should be compelled to pay the costs of suit, and not the appellee.

In conclusion, we submit that the decree of the trial Court is just and fair and is supported by all of the evidence in the transcript.

We submit the rulings of the lower Court and its decree should be affirmed.

Respectfully submitted,

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*Attorney for Appellee.*